KING'S TANGLIN SHOPPING PTE. LTD.

v.

CHEE KIM NEO

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[DC SUIT NO. 5817 OF 1990]
11 MAY 1991

TORT: *Nuisance - Trespass - Car park owners - Common wall - Air conditioner - Discharge of air into car park - Merely on issue of discharge - Whether party wall - Entry not confined to physical entry - Trespass need not be tangible - Damages - Proof - Land Titles Strata Act [Sing], ss. 3, 13, 33.*

The plaintiffs are owners of a car park which shares a common boundary with the defendant's property and several other properties in the same row of strata title units. These units are separated from the car park by a brick wall.

The defendant installed a window air-conditioner on the common wall. The plaintiffs objected to this on the ground that what the defendant did was a trespass and a nuisance and sued for an injunction and damages.

The plaintiffs applied for summary judgment. The Judge made no finding on the question of trespass but held that there was nuisance as the hot air discharged by the defendant's air-conditioner was at a point where the plaintiffs' invitees stopped to receive their parking tickets. The plaintiffs were granted an interim injunction pending the trial of the issues.

The defendant appealed against the grant of the interim injunction as she contended that there was a contentious issue on whether there was nuisance.

Held:

[1] The finding of nuisance based simply on the point of discharge by the Judge was wrong in law; the nuisance must be actionable. There was no allegation by the plaintiffs as to the direction of flow of the air so discharged or that hot air was being discharged on invitees, and there was no affidavit from any invitee that hot or warm air have been discharged on him and he had suffered personal discomfort. The plaintiffs did not aver as to how the hot air was discharged on him or the invitees and how they suffered personal discomfort.

[2] Having found for the plaintiffs on nuisance, he should have given judgment for the plaintiffs as this was an application for summary judgment; instead he granted an interim injunction which was not sought by the plaintiffs. But, if he had thought that the issue of nuisance was also arguable, then he should not have granted the interim injunction as there was no application before him for such an order.

[3] Section 3 of the Land Titles (Strata) Act (the Act) defines the expression "common property" to include, *inter alia*, the walls of the buildings erected within a strata lot. Under s. 13 of the Act, the said common property is held by the subsidiary proprietors as tenants-in-common, and under s. 33 the subsidiary proprietors constitute, upon the registration of the strata title plan, a management corporation. Therefore, even if the making of a hole in the wall dividing the 2 premises were a trespass, only the management corporation would be entitled to take action against the defendant. The plaintiffs' case will probably fail if argued on the basis that the wall in question is a party wall.

[4] The plaintiffs must succeed on the claim for trespass as entry to the land of the plaintiff is not confined to physical entry although it is the commonest type of trespass. Further, trespass need not be tangible. The discharge of warm air from the air-conditioner into the plaintiffs' property is trespass, for it has mass and it moves.

[Plaintiffs granted a permanent injunction restraining the defendant, from continuing to use the air-conditioner or any other means to discharge air or exhaust into the car park; no damages awarded as it is difficult to see what damages the plaintiffs have suffered.]

Case referred to:
Gregory v. Piper [1829] 9 B & C

Legislation referred to:
Land Titles (Strata) Act [Sing], ss. 3, 13
Land Titles Act [Sing], s. 92

Other sources referred to:
Clerk & Lindsell on Torts, 16 Edn. para. 24-01
Salmon & Heuston on The Law of Torts, 19th Edn. at p. 46
Street on Torts 7th Edn. at p. 59 n. 6
45 Hals Laws of England 4th Edn. p. 632 n. 12

For the appellant/defendant - Lim Biow Chuan
For the respondents/plaintiffs - Laurence Wee (Patrick Wee with him)

JUDGMENT

Chan Sek Keong J:

The plaintiffs own Lot 1027 of TS 24 which is the car park in the Tanglin Shopping Centre. The defendant owns Lot 1207/U8 known as #B1-06 Tanglin Shopping Centre. The car park shares a common boundary with the defendant's property and several other properties in the same row of strata title units. A brick wall separates the car park from these units.

The defendant has been using her property as a pub called "Excalibur". She needed air-conditioning for her business after the central air-conditioning was shut off after 7 p.m. each night. So she installed a window air-conditioner on the common wall. The plaintiffs objected to this on the ground that what the defendant did was a trespass and also a nuisance. They sued for an injunction and damages.

The plaintiffs applied for summary judgment. The district Judge made no finding on trespass. He held that there was a nuisance as the hot air or vapour discharged by the air-conditioner was discharged at the point where the plaintiffs' invitees would have to stop their cars to receive the parking tickets. She granted an interim injunction pending the trial of the issues.

The defendant has appealed against the grant of the interim injunction on the ground that there was a seriously arguable issue on whether there was a nuisance, it being a question of fact whether what she had done had unduly interfered with the enjoyment of the plaintiffs' land by the plaintiffs or their invitees. He referred to *Clerk & Lindsell on Torts*, 16 Edn. para. 24-01 which reads:

> The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. In common parlance, stenches and smoke and a variety of things may amount to a nuisance in fact but whether they are actionable as the tort of nuisance will depend upon a variety of considerations and a balancing of conflicting interests.

Counsel submits that only warm air and not hot air was discharged by the air-conditioner and that the discharge was certainly less deleterious to health than the motor emissions from the motor vehicles that used the car park.

I agree with the submission of Counsel for the defendant on the question of nuisance. The finding of nuisance based simply on the point of discharge is wrong in law. The nuisance must be actionable. There was no allegation by the plaintiffs as to the direction of flow of the air so discharged or that hot air was being discharged on invitees, and there was no affidavit from any invitee that hot or warm air had been discharged on him and he had suffered personal discomfort. There was a late affidavit from the senior maintenance officer of the plaintiffs in which he asserted that the hot air discharged from the air-conditioner caused him discomfort, and also caused that part of the premises to be unhealthy and uncomfortable to occupy. He does not say how the hot air came to be discharged upon him. Relying only on common knowledge and common sense, I would have thought that if anything was unhealthy in the car park, it would have been the motor fumes that were discharged daily by the motor vehicles coming in and out of the car park, and stopping and starting when the drivers had to take the parking tickets and to pay the parking charges.

The decision of the district Judge contained another unusual feature. Having found for the plaintiffs on nuisance, he should have given judgment for the plaintiffs as this was an application for summary judgment. But, if he had thought that the issue of nuisance was also arguable, then he should not have granted the interim injunction as there was no application before him for such an order.

For this reason, the plaintiffs are also unhappy with the decision of the district Judge. Their Counsel submits that a permanent injunction should have been granted on the ground that there is a continuing trespass on the plaintiffs' property, even if there were a triable issue on nuisance. It is argued that the plaintiffs own one half of the common wall as it is a party wall: he refers to s. 92 of the Land Titles Act, Cap. 157 which defines the expression "party wall" to mean "a wall severed vertically and longitudinally with separate ownership of the severed portions." Accordingly, it is argued that the defendant trespassed on that half of the wall by making a hole through it and placing the air-conditioner or the exhaust vent on it. Counsel says that the wall is a party wall.

Counsel for the defendant submits that s. 92 of the Land Titles Act does not apply as the property has a strata title and that the common wall is not a party wall but common property. I think this submission is probably right. Section 3 of the Land Titles (Strata) Act, Cap. 158 defines the expression "common property" to include, *inter alia*, the walls of the building erected within a stratum shown or specified in any strata sub-division plan. Presumably, these are walls which separate one strata lot from another and do not mean internal walls within a strata lot. Under s. 13 of Cap. 158, the common property is held by the subsidiary proprietors as tenants in common, and under s. 33 the subsidiary proprietors constitute, upon the registration of the strata title plan, a management corporation. Therefore, even if the making of a hole in the wall dividing the two premises were a trespass, only the management corporation would be entitled to take action against the defendant. The plaintiffs' case will probably fail if argued on the basis that the wall in question is a party wall.

In my view, however, the plaintiffs must succeed on trespass. The tort of trespass to land consists in the act of (1) entering upon land in the possession of the plaintiff, or (2) remaining on such land, or (3) placing or projecting any object upon it - in each case without lawful justification." see *Salmon & Heuston on The Law of Torts*, 19th Edn. at p. 46. The entry upon the land of the plaintiff is not confined to physical entry although it is the commonest

type of trespass. In *Gregory v. Piper* [1829] 9 B & C, it was said that "If a single stone had been put against the wall it would have been sufficient." Discharging water upon another's land is also trespass: see authorities cited in *45 Hals Laws of England* 4th Edn. p. 632 n. 12.

Trespass need not be tangible. *Street on Torts* 7th Edn. at p. 59, n. 6 opines that to cause some foreign matter, perhaps anything having size or mass, including gases, flames, beams from searchlights and mirrors to enter or come into physical contact with the land of the plaintiff is a trespass. I agree with the opinion of the late Professor Street. In the present case, the discharge of warm air from the air-conditioner into the plaintiffs' property is trespass, whatever the quality or odour of the extracted air may be. It has mass, and it moves. If this discharge is not actionable as trespass, the plaintiffs will also be able to instal an air-duct on the wall to extract the air from the car park into the property of the defendant.

Trespass is actionable *per se* without proof of damage. Accordingly, I hereby grant a permanent injunction restraining the defendant, her servants or agents or any of them from continuing to use the air-conditioner or any other means to discharge air or exhaust into the car park. There will be no inquiry on damages as I am unable to see what damage the plaintiffs have suffered. The defendant will pay the costs of the appeal limited to the issue of trespass.

Also found at [1991] 3 CLJ 1933